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State of Utah v. Austin Whitely : Brief of Respondent

Utah Supreme Court

Joseph Chez, Zelph S. Calder; attorneys for plaintiff and respondent.

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,
vs.
AUSTIN WHITELY,
Defendant and Appellant.

No. 6191

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT OF FACTS

The appellant in the trial court announced through his counsel that he desired to waive a jury and try the cause before the court. The trial court, with the approval of the District Attorney, consneted to appellant's request and dismissed the jury.

To the trial court's conviction of burglary, appellant claims error to this court for the following reasons: (1) There was insufficient evidence to warrant a conviction. (2) The corpus delecti was not established; and (3) The trial court erred in holding that the burden of proof shifted to the defendant when he presented his alibi.

The first two points are similar, hence will be treated together.

Appellant's recitation of the facts, and the transcript of the testimony form ample argument and authority to support and uphold the trial court's judgment. A few observations will, we believe, conclusively rest the judgment of this court with that of the trial court.

A crime of burglary in the second degree was committed in the home of Arthur D. Miller, Farmington, Utah, about eight o'clock November 31, 1938. This was admitted by the appellant. (Tr. p. 40). It was also admitted by him that the person who confronted Deputy Sheriff Oviatt with a gun about eight p. m. November 30, just north of the intersection of Lagoon Lane and the old State Highway was the guilty person. (Tr. p. 65). Hence, all that was left for the state to do was to establish the evidence of identity of the person who confronted the sheriff (above mentioned) with that of the apellant.

Reed Oviatt, a Deputy Sheriff, testified that he and his wife left their home east on Lagoon Lane just be-

fore eight p. m. November 30, 1938; that on approaching the intersection of the highway and Lagoon Lane, about three blocks north of Farmington, Utah, he noticed the tread marks of the tires of a parked automobile as being "the kind of tread marks we were looking for." (Tr. p. 53); that he further examed the tires and automobile with his flash light; that it was a dark blue 1932 Chevrolet coach with red wire wheels, a fish-pole antenae on the left side and had screw type general tires; that he sent his wife to phone Deputy Sheriff Roberts and waited in a fruit stand about 19 feet south of said intersection on the southwest corner; that said car was near the fruit stand; that Arthur Miller's home, where the burglary was committed, was west from said intersection about 150 yards. (Tr. p. 45). The pertinent testimony of Deputy Sheriff Reed Oviatt reads as follows: (Tr. p. 58)

> "I stepped back in the fruit stand to watch for the burglar, (Tr. p. 58) and Mr. Roberts and I had been back there a minute or two and I saw a fellow come up the sidewalk, up Lagoon Lane *****on the opposite side of the lane from me *****in a northeasterly direction * * * he was coming up the lane. He had his arms full of things*****. Instead of coming over to the car, he walked right to the corner and then turned north.*****I proceeded to overtake him. I caught up with him there, right in front of Emma Miller*****225 feet north from the fruit stand *****. He dropped some things he had in his arms and instantaneously turned around.*****He told me he had a shot gun and ordered me to stop,

> and not move. Then he backed around me; and I had my flashlight in my hand. He asked what I had and I told him. He said, 'Drop it,' and I dropped that. He backed around me. Backed toward the sidewalk and started back down the sidewalk." (Tr. p. 60)

Said Reed Oviatt further testified that there was a light on both corners; that he could see his facial features but could not tell the color of his eyes. (Tr. p. 61). That when he reached a point about 90 feet south on the sidewalk he shot at him and that he ran and got into the mentioned parked car and drove away.

Mr. Oviatt identified the defendant in the courtroom as the person he saw on the above mentioned occasion. (Tr. p. 61).

The above mentioned scene, on cross examination of Mr. Oviatt, was acted in the court room; defense counsel Mr. McCarty taking the part of the Deputy Sheriff, and Mr. Oviatt taking the part of the criminal. (Tr. p. 77).

On re-direct examination Mr. Oviatt identified the car which appelant drove to the court room as the same car he examined on the night of November 30th, and the same car that appellant got into when fleeing from the scene of the "stick-up".

Appellant's counsel in his brief advances considerable persuasion to the effect that appellant is not the guilty person; that his identity could not be certain under

the circumstances. His argument treats wholly of the weight of the evidence. It is a good jury argument; but for this court which is concerned only with the question of the sufficiency of the evidence, his argument we believe partakes of little force against the overwhelming evidence above related.

We believe the evidence so conclusively passes the test of sufficient evidence that it is unnecessary to cite authority in support of our contention.

III.

Appellant next claims "That the Trial Court erred in holding that the burden of proof shifted to the defendant when he presented his alibi."

First, we have endeavored to find where such a claim, if it represents the trial court's position, goes to prejudice the substantial rights of the appellant; and second we fail to find in the court's comments on alibi, where it found erroneously.

The trial court in its "memorandum decision" with respect to alibi states as follows: (Tr. p. 17)

> "The court can not say that the defendant has by that alibi offered sufficient proof to establish a reasonable doubt that he was not at Farmington at the time of the burglary, as against the other testimony in the case, established by direct and circumstantial evidence in the case.

"In the case of State v. Vanek, 84 Pac. (2nd) 567, the Idaho Supreme Court held:

> (6, 7) "Where a defendant relies upon the defense of alibi, the burden of establishing such defense is upon him, and if he succeeds, by competent evidence, in establishing a reasonable doubt in the minds of the jury, as to his presence at the time and place when and where the offense was committed, when the committing of the offense by him made his presence imperative, he is entitled to an acquittal, but the character and extent of the evidence requisite to create such doubt is a matter for the jury."
>
> "In reaching the decision the Court holds the defendant, under the case recited above, failed to prove his alibi by competent evidence, sufficient to create doubt in the mind of the Court.
>
> "The court is, therefore, of the opinion that the motion for a new trial should be denied, and such is the Order of the Court."

The law in Utah, prior to the adoption of the new code of criminal procedure in 1935, allowed the defendant to raise a defense of alibi at any time without notice to the State. The State would in many cases be taken by surprise and not have an opportunity to properly meet said defense. The result was in many cases just prosecution circumvented.

Judicial decisions recognize this for Commonwealth v. Stine, 158 Atl. 602 (Penn.) at page 602 says:

> "But in every case where the defense of alibi is made it should be very closely scrutinized for

> the reason so forcibly expressed by an eminent judge. It is a defense often attempted by contrivance, subordination, or perjury, and the proof therefore offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to contest or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it, and this defense is equally available if satisfactorily established to avoid the force of positive as of circumstantial evidence."

The Laws of Utah, 1935, Chapter 120, Section 1, on page 231, reads as follows:

> "Whenever a defendant shall propose to offer in his defense evidence to establish an alibi on behalf of the defendant, such defendant shall at the time of the arraignment or within ten days thereafter, but not less than four days before the trial of such cause, file and serve upon the prosecuting attorney in such cause, notice in writing of his intention to claim such defense, and in case of a claimed alibi, such notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.
>
> "If the Defendant fails to file such notice he shall not be entitled to introduce evidence tending to establish an alibi. The court may, however, permit such evidence to be introduced where good cause for the failure to file the notice has been made to appear."

It is apparent that the 1935 Legislature, through the last quoted section, recognized the principle announced

in the Stine case which sought to prevent escape of justice through the defense of alibi. It appears that the Legislature intended the defense of alibi to be raised as an affirmative defense, and to require the defendant to go further and appraise the state in advance where he claims he was at the time of the commission of the alleged crime. Under such a legislative provision, it surely could not fall on the State the responsibility to prove defendant was not at said certain place before he established proof that he was at said place. It seems very plain that it is the duty of the defense to go forward and establish his affirmative defense of alibi.

The Trial Court's holding strikes at the question of guilt or innocence. It does not mean that the defendant, by evidence beyond a reasonable doubt, has to establish his innocence. It simply means that if he can succeed through his defense of alibi in establishing a doubt of his guilt in the minds of the jury then he deserves an acquittal.

In other words, assume the minds of the jury reflect the guilt of the defendant before he raises his defense of alibi. He is clothed with an additional protection of alibi to effect a change in the minds of the jury from that of guilty beyond a reasonable doubt of that of questionable doubt which effects a result of innocent.

There are many jurisdictions that hold the burden of proving an alibi rests with the accused, (16 C. J. 533) including Delaware, Georgia, Illinois, and Iowa.

Even if the Trial Court was in error on the question of alibi, the error does not reach into prejudicing the substantial rights of this appelant because the court as a finder of the facts found him guilty.

We submit that the Trial Court committed no error prejudicing the substantial rights of this appellant and that he was also given a fair trial.

Respectfully submitted,

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BRIEFS

FOR NO; 6191